APPENDIX A

(On March 16, 1967, the State of Florida filed its INFORMATION herein, in the Criminal Court of Record in and for Dade County, Florida, which said INFORMATION was duly docketed by the Clerk of the Court as Case No. 67-2207 of said Court and is in the words and figures following, to-wit:)

67-2207

IN THE CRIMINAL COURT OF RECORD, in and for Dade County, State of Florida, FEBRUARY Term, 1967.

Information for Breaking and Entering Dwelling

(Filed Mar 16 1967)
J. F. McCracken, Clerk C

THE STATE OF FLORIDA

v.

FRANK HIRAM BEAUCHAMP and GARY JAMES SYLVIA

IN THE NAME AND BY AUTHORITY OF THE STATE OF FLORIDA:

SEYMOUR GELBER, Assistant State Attorney of the Eleventh Judicial Circuit of Florida, prosecuting for the State of Florida, in the County of Dade, under oath, information makes that FRANK HIRAM BEAUCHAMP and GARY JAMES SYLVIA on the 12th day of March, 1967, in the County and State aforesaid, did unlawfully and feloniously break and enter a dwelling house located at 480 Northeast 180th Drive, City of North Miami Beach, Dade County, Florida, property of HAROLD and ELAINE SCHIFF, with intent to commit a felony therein, to-wit: ROBBERY, that is to say, the defendant, FRANK HIRAM BEAUCHAMP, being then armed with a dangerous weapon, broke and entered the premises as aforesaid with intent by force and violence or by putting in fear to rob, steal, take and carry away personal property from the person or custody of the said HAROLD and ELAINE SCHIFF against their will; and the defendant, GARY JAMES

SYLVIA, as a principal in the first degree, was then and there aiding, abetting and otherwise procuring the defendant, FRANK HIRAM BEAUCHAMP, the said felony to do and commit, by GARY JAMES SYLVIA waiting outside said premises in an automobile parked near the premises aforesaid and for the purpose of aiding, abetting and otherwise procuring the said FRANK HIRAM BEAUCHAMP to escape from the scene of the said crime, and to escape detection, arrest and punishment therefor, being in violation of 810.01 and 776.011 Florida Statutes,

MSH:alc
3/15/67
a Deft: Jail # 6917-67 Bkd: 3/12/67
b Deft: Jail # 6916-67 Bkd: 3/12/67

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contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida

/s/ SEYMOUR GELBER
Assistant State Attorney,
Eleventh Judicial Circuit of
Florida

STATE OF FLORIDA:
COUNTY OF DADE:

Personally appeared before me, SEYMOUR GELBER, Assistant State Attorney of the Eleventh Judicial Circuit of Florida, who, being first duly sworn, says that the allegations set forth in the within Information are based upon facts that have been sworn to as true, and which facts, if true, would constitute the offense therein charged.

/s/ SEYMOUR GELBER
Assistant State Attorney,
Eleventh Judicial Circuit of
Florida

Sworn to and subscribed before me this 15th day of March, 1967.

J. F. McCracken, Clerk
Criminal Court of Record,
Dade County, Florida

By: /s/ B. Kambas , D.C.

(Seal, Criminal Court of Record)

Defendants Frank Hiram Beauchamp and Gary James Sylvia arraigned in open Court on the within Information and pleaded .....

.....
Deputy Clerk, Criminal
Court of Record, Dade
County, Florida

Case No.

Criminal Court of Record
Dade County, Florida

The State of Florida

v.

Frank Hiram Beauchamp and Gary James Sylvia

Information for Breaking and Entering Dwelling

Witnesses for the State:

1. Harold Schiff
   480 N.E. 180th Dr.
2. Julius Deitch
   3280 Ponce DeLeon Blvd.
3. Lt. Charles Black,
4. Sgt. Robert Hoelscher,
5. Det. R.B. James,
6. Det. Frank Beirne,
7. Det. Adam Carter and
8. Det. Herbert Kuppersmith
   All of DPS

APPENDIX B

And on March 31, 1967, the Defendant filed herein his MOTION FOR SEVERANCE, which said MOTION is in the words and figures following, to-wit:

IN THE CRIMINAL COURT OF RECORD IN AND FOR DADE COUNTY, STATE OF FLORIDA,

FEBRUARY TERM, 1967

Case No. 67-2207-B

Motion for Severance

(Filed Mar 31 1967)
J. F. McCracken, Clerk K

THE STATE OF FLORIDA

v.

FRANK HIRAM BEAUCHAMP and GARY JAMES SYLVIA

COMES Now the defendant, GARY JAMES SYLVIA, by his undersigned attorney, and moves this Honorable Court for a severance of defendants and separate trials of the defendants herein, and as grounds therefor states as follows:

1. That if the defendants herein were to be tried jointly, defendant, Gary James Sylvia, could be frustrated in his right to call the co-defendant as a witness because of the co-defendant's privilege against self-incrimination and if said co-defendant exercised such right, this defendant would be frustrated and embarrassed in his defense of this matter.

2. That upon information and belief movant's co-defendant is a person previously convicted for felonies and is presently under information or indictment and that a joint trial with said co-defendant could seriously em-

barrass and hamper this defendant in presenting his defense to the crimes alleged.

3. That this defendant would be deprived of the right to select a jury of his own desire and liking in contravention of the constitutional rights afforded him in the State of Florida and United States Constitutions if he were subjected to objections by the co-defendant as to prospective jurors.

4. That because of the crimes alleged, this defendant would be extremely prejudiced if made to suffer a joint trial with the co-defendant herein.

/s/ LAWRENCE I. HOLLANDER
Lawrence I. Hollander
Attorney for Defendant,
Gary James Sylvia
407 Lincoln Road
Miami Beach, Florida

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Severance, was on this 31st day of March, 1967, mailed to Hon. Richard E. Gerstein, State's Attorney, 1351 N.W. 12th Street, Miami, Florida.

/s/ LAWRENCE I. HOLLANDER
Lawrence I. Hollander

APPENDIX C

IN THE CRIMINAL COURT OF RECORD, IN AND FOR DADE COUNTY, STATE OF FLORIDA

FEBRUARY TERM, 1967

Case No. 67-2207

Filed this 19 day of Apr. A. D. 1967 and recorded in Criminal Court of Record, Minutes No. 241 on Page 299-300

J. F. McCRACKEN, *Clerk*
By ILEEN L. JERVIS, Deputy

THE STATE OF FLORIDA

v.

FRANK HIRAM BEAUCHAMP and GARY JAMES SYLVIA

Order

(Filed Apr 19 1967)

THIS CAUSE having come on to be heard on the 13th day of April, 1967, upon defendant, GARY JAMES SYLVIA's motion for a bill of particulars, motion for severance and motion ore tenus to adopt the motion to suppress of the defendant, Frank Hiram Beauchamp, as and for the motion of the defendant, Gary James Sylvia, and the Court having heard argument of counsel for the respective parties hereto, and being otherwise advised in the premises, it is thereupon

ORDERED AND ADJUDGED as follows:

1. That defendant, GARY JAMES SYLVIA's motion for severance, be and the same is hereby denied.

2. That defendant, GARY JAMES SYLVIA's motion for a bill of particulars, be and the same is hereby:

(a) Granted as to paragraph numbered 1 thereof.

(b) Denied as to paragraph numbered 2 thereof.

(c) Granted as to paragraph numbered 3 thereof.

(d) Granted as to paragraph numbered 4 thereof.

(e) Granted as to paragraph 5 thereof with respect to any and all statements signed or unsigned, reduced to writing, and otherwise denied.

(f) Denied as to paragraph numbered 6 thereof.

(g) Denied as to paragraph numbered 7 thereof.

3. That the State of Florida shall furnish said defendant the information sought by said defendant in his motion for bill of particulars as to those items contained in said motion hereinbefore granted, within ten (10) days from the date hereof.

DONE AND ORDERED at Miami, Dade County, Florida, this 17th day of April, 1967.

/s/ EDWARD S. KLEIN
Judge, Criminal Court

Book 241—Page 300

APPENDIX D

(And on May 6, 1967, the Court entered its JUDGMENT AND SENTENCE herein, which said JUDGMENT AND SENTENCE was duly filed and recorded on said date by the Clerk of the Court in Criminal Court of Record Minute Book No. 243, on Page 354, and is in the words and figures following, to-wit:)

BENCH DOCKET

Criminal Court of Record
Dade County, Florida

STATE OF FLORIDA

v.

GARY JAMES SYLVIA

Charge, Breaking and Entering Dwelling

Case No. 67-2207-B

Judgment

It appearing unto this Court that you, Gary James Sylvia, have been regularly tried and convicted of Unlawfully and feloniously breaking and entering a dwelling house located in Dade County, Florida, with the intent to commit a felony, to-wit: Grand Larceny

IT IS THEREFORE THE JUDGMENT of the law and it is hereby adjudged that you are and stand convicted of the offense as above set forth.

What have you to say why sentence should not now be imposed upon you?

Saying nothing that could influence the Court in its decision.

SENTENCE

IT IS FURTHER CONSIDERED, ORDERED AND ADJUDGED that you be imprisoned by confinement at hard labor in the STATE PENITENTIARY for a term of EIGHT (8) YEARS.

DONE AND ORDERED in open Court at Miami, Dade County, Florida, this 6 day of May A. D. 1967.

/s/ EDWARD S. KLEIN
Judge.

Filed this 6 day of May, A. D. 1967 and recorded in Criminal Court of Record, Minutes No. 243 on Page 354

J. F. McCracken, Clerk

By: DORIS MCVAY
Deputy Clerk

DIV. A.. B./.. C.. D..

Book 243—Page 354

APPENDIX E

(And on May 8, 1967, the Defendant filed herein his MOTION FOR NEW TRIAL, which said MOTION is in the words and figures following, to wit:)

IN THE CRIMINAL COURT OF RECORD, IN AND FOR DADE COUNTY, STATE OF FLORIDA

No. 67-2207 A and B

STATE OF FLORIDA, *Plaintiff*,

v.

FRANK HIRAM BEAUCHAMP and GARY JAMES SYLVIA
Defendants.

Motion for New Trial

(Filed May 8 1967)

Comes Now the Defendant, GARY JAMES SYLVIA, by and through his undersigned counsel, and files this Motion for New Trial, upon the following grounds:

1. The evidence does not support the verdict against the defendant, Gary James Sylvia.

2. The law of the case as applied to the evidence presented to the jury does not support the verdict against the defendant, GARY JAMES SYLVIA, and the judgment entered thereon.

3. The Court erred in failing to grant a severance as to GARY JAMES SYLVIA in that the failure to grant said severance prejudiced his right to fair trial.

4. The Court erred under the requirements of *Jencks* v. *United States*, 353 U.S. 657, 1 L.Ed.2d, 1103, in failing to require the State to produce statements of the prosecuting witness for the purpose of aiding counsel in cross-examining that witness.

5. The defendant, GARY JAMES SYLVIA, was denied his constitutional right to fair trial in that material evidence was discovered by counsel on Saturday morning, May 5, 1967, which could not have been discovered by reasonable diligence prior to that time. The evidence was material insofar as the credibility of the witness, Julie Deitch, the principal and only witness testifying materially in the case of State v. this defendant, Gary James Sylvia. The importance of the testimony presented to the Court by proffer is heightened by the fact that during his deliberations, the jury requested the rereading of the charge concerning entrapment. The evidence in question raised serious doubts as to the bonafides of the witness Julie Deitch.

6. The defendant, Gary James Sylvia's constitutional rights and protection were not fully protected in that comment was made on evidence to be produced and produced on behalf of the defendant, Frank Hiram Beauchamp, which would necessarily raise a question in the minds of the jurors as to the failure of the defendant, Gary James Sylvia, to present testimony in his behalf. No instructions of the Court could erase any such query raised in the minds of any juror. See *DeLuna* v. *United States,* 308 Fed.2d 140. Petition for rehearing denied, 324 Fed.2d 375.

7. Defendant, Gary James Sylvia, if granted a severance and a new trial, would call to the stand the co-defendant, Frank Hiram Beauchamp, to establish the innocence of the defendant, Gary James Sylvia. Prior to the verdict of the jury and the sentence imposed by the Court, the antagonism between the two defendants reflected repeatedly in the record, made it impossible for counsel for defendant, Gary James Sylvia, to secure information subsequently received, which could only come from testimony of the co-defendant, Frank Hiram Beauchamp. That testimony could not have been introduced at the trial of the defend-

ants tried jointly under the restrictive constitutional requirements elucidated in DeLuna.

8. For the foregoing reasons, defendant Gary James Sylvia, respectfully requests the consideration of this Court in granting a new trial to him without the inclusion of Frank Hiram Beauchamp as a co-defendant.

MILTON E. GRUSMARK and
LAWRENCE I. HOLLANDER
Attorneys for defendant, Gary James Sylvia
407 Lincoln Road
Miami Beach, Florida

By /s/ MILTON E. GRUSMARK
Milton E. Grusmark

I HEREBY CERTIFY that a true and correct copy of the Foregoing Motion for New Trial was on this 8th day of May, 1967, hand delivered to the Office of the Hon. Richard E. Gerstein, State Attorney, 1351 N.W. 12th Street, Miami, Florida.

By /s/ MILTON E. GRUSMARK
Milton E. Grusmark

APPENDIX F

(And on May 8, 1967, the Clerk of the Court entered in Criminal Court of Record Minute Book No. 243, on Pages 548 and 549, the following minutes, to-wit:)

DIVISION "B" May 8, 1967

No. 67-2207

THE STATE OF FLORIDA

v.

FRANK HIRAM BEAUCHAMP and GARY JAMES SYLVIA

Breaking and Entering Dwelling

Michael A. Masin, Assistant State Attorney.

Ronald J. Anderson, Counsel for the Defendant, Frank Hiram Beauchamp.

Milton E. Grusmark, Counsel for the Defendant, Gary James Sylvia.

Reported by: Elizabeth Driest.

Milton E. Grusmark, Counsel for the Defendant, Gary James Sylvia, presented a Motion for a New Trial, which motion the Court denied.

Milton E. Grusmark, Counsel for the Defendant, Gary James Sylvia, presented an Application for Bond.

The Court set Supersedeas Bond, as to the Defendant, Gary James Sylvia, in the amount of Seven Thousand Five Hundred ($7,500.00) Dollars, in the above styled cause.

Book 243—Page 548

APPENDIX G

IN THE CRIMINAL COURT OF RECORD, IN AND FOR DADE COUNTY, STATE OF FLORIDA

Case No. 67-2207 B

STATE OF FLORIDA, *Plaintiff*,

v.

FRANK HIRAM BEAUCHAMP and GARY JAMES SYLVIA
Defendants.

Assignment of Errors and Directions to the Clerk

The defendant, Gary James Sylvia, assigns as the errors on which he intends to rely in the District Court of Appeal, Third District of Florida, for reversal from the Order, Judgment and sentence appealed from, the following:

1. The verdict was contrary to the evidence.

2. The verdict was contrary to the law applicable.

3. The verdict was contrary to the law applicable and evidence.

4. The Court erred in failing to direct a verdict in favor of this defendant at the close of the prosecution's case, which motion for directed verdict was renewed at the conclusion of the defendant's case.

5. That the Court erred in failing to grant this defendant's motion for a directed verdict at the close of the defendant's case.

6. That the Court erred in denying this defendant's motion to quash the information by its order dated April 21, 1967.

7. That the Court erred in denying this defendant's motion for severance by its order dated April 17, 1967, in violation of defendant's constitutional rights pursuant to

the applicable provisions of the Florida Constitution and the 6th and 14th Amendments to the United States Constitution.

8. That the Court erred in denying this defendant's motions for severance repeatedly renewed during the course of the trial in this cause in violation of this defendant's constitutional guarantees under the applicable provisions of the United States and Florida Constitutions.

9. That the Court erred in its order of April 17, 1967, in denying paragraphs 2, 5, 6 and 7 of this defendant's motion for bill of particulars.

10. That the Court erred in denying this defendant a hearing on its motion to suppress prior to trial.

11. That the Court erred in denying this defendant's motion ore tenus on May 1, 1967, to dismiss the information herein for the failure of the prosecution to provide this defendant with a bill of particulars in accordance with the Court's order of April 17, 1967.

12. That the Court erred in denying this defendant's motion ore tenus on May 1, 1967, to continue the trial of this cause for the failure of the prosecution to provide this defendant with a bill of particulars in accordance with the Court's order of April 17, 1967.

13. That the Court erred in denying this defendant's motion to produce statements of Julius Deitch made to the prosecuting authorities, said Julius Deitch being a police officer or agent, in violation of this defendant's constitutional guarantees under the United States Constitution.

14. The Court erred in denying this defendant's renewed motion to inspect statements provided by the witness, Julius Deitch, to the prosecution.

15. That the Court erred in entering judgment of conviction against this defendant.

16. That the Court erred in denying defendant's motion for new trial by its order dated

17. That the Court erred in imposing sentence of this defendant.

18. That the Court erred in denying all of this defendant's requested jury instructions.

19. That the Court erred and abused its discretion in failing to permit this defendant to reopen the case after the close of all the testimony but before final argument upon proffer to the Court of newly discovered evidence.

20. That the Court erred in overruling this defendant's objections to improper statements of the Prosecutor in closing argument.

APPENDIX H

Not Final Until Time Expires To File Rehearing Petition and, If Filed, Disposed Of.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

January Term, A.D. 1968

Case No. 67-430

GARY JAMES SYLVIA, *Appellant,*

vs.

THE STATE OF FLORIDA, *Appellee.*

Case No. 67-531

FRANK HIRAM BEAUCHAMP, *Appellant,*

vs.

THE STATE OF FLORIDA, *Appellee.*

Opinion Filed May 7, 1968

Appeals from the Criminal Court of Record for Dade County, Edward S. Klein, Judge.

Milton E. Grusmark, Natalie Baskin; and Lawrence I. Hollander (for Sylvia); Engel & Pollack and Jack J. Taffer (for Beauchamp), appellants.

Earl Faircloth, Attorney General and Arden M. Siegendorf and Arthur L. Rothenberg, Assistant Attorneys General, for appellee.

Before Charles Carroll, C.J., and Barkdull and Swann, JJ.

Per Curiam.

Both of the above numbered appeals seek review of certain criminal proceedings wherein each of the appellants suffered an adverse jury verdict, judgment of conviction and sentence thereon. They have not been consolidated for appellate purposes, but were argued before court

on the same day and will be disposed of by this consolidated opinion.

The record on appeal reveals the following: On or about February 28, 1967, one Julius Deitch (an undercover agent for the Wackenhut Corp.) met the appellant Beauchamp. He was introduced by a so-called mutual friend as "Julie". Thereafter, Deitch let it be known to Beauchamp that he was just released from jail. He also passed on the information that his trade was that of an "iceman" and he was in desperate need of money. On March 5, 1967 Beauchamp took Deitch for a ride to 480 N.E. 180 Drive, North Miami Beach, where Beauchamp pointed out the home of one Schiff and informed Deitch that the lady who lived there had purchased some large diamonds from her father, a jewelry salesman. Beauchamp further stated that these diamonds could be fenced for approximately $1,000.00. Thereafter, Deitch and Beauchamp discussed the robbery on various occasions, mostly pertaining to the fencing of the jewelry. On March 8, 1967, Deitch met with Beauchamp, at which time the latter informed him he wanted the appellant, Sylvia, to accompany them on the job. Thereafter, Deitch met with Beauchamp at the apartment of one Doreen Greer, where he was introduced to Sylvia who Beauchamp said was a good man and that they had worked together in the past. No further conversation was held regarding the robbery until about 6:00 P.M. March 11, 1967, when Deitch, Beauchamp and Sylvia proceeded to the location of the robbery, at which time Beauchamp again pointed out the house and stated that it was the house they were going to hit and they discussed where the car would be parked. At about 8:00 P.M. that evening, Deitch met Beauchamp and Sylvia at the apartment of Doreen Greer and the three men and one Mr. Fabian went to Beauchamp's apartment, which was in the same building. Upon their arrival, Beauchamp proceeded to lay out the structure (or floor plan) of the house to be

robbed and they agreed among themselves that Beauchamp and Sylvia would enter the house and Deitch would drive the car. At about 10:00 P.M. that evening, Deitch called Beauchamp and they arranged to meet at the Dog House Restaurant at 163 Street and W. Dixie Highway at 2:00 A.M. on March 12, 1967. Beauchamp and Sylvia arrived at the restaurant at about 2:20 A.M. and Beauchamp informed Deitch that Sylvia would drive and that he and Deitch would enter the house. They proceeded to the scene of the robbery. While traveling, Beauchamp provided stockings for masks, gloves, and some wire in the event they needed to tie anyone up. Upon arriving at the scene, Sylvia remained in the car and Beauchamp and Deitch proceeded to the house. Beauchamp entered the house first, followed by Deitch. Immediately upon entering, they were accosted by sheriff's deputies who were lying in wait for them. Beauchamp was arrested and the gun he was carrying, along with the wire, gloves, and stocking mask were seized. Deitch slipped out the door and left the scene. Thereafter, one of the deputies proceeded to the parked vehicle and placed Sylvia under arrest. Beauchamp and Sylvia were each charged with breaking and entering a dwelling house with intent to commit a felony therein, to wit: robbery. They each pleaded not guilty to the charge and demanded a jury trial.

Of course, certain of this evidence was in conflict but, at this stage of the proceedings, all conflicts in the evidence and all reasonable inferences therefrom are in favor of the verdict. Crum v. State, Fla. App. 1965, 172 So. 2d 24; Mangel v. State, Fla. App. 1965, 179 So. 2d 888; Walden v. State, Fla. App. 1966, 191 So. 2d 68; Hennessy v. State, Fla. App. 1967, 198 So. 2d 37.

The first error complained of is that the trial court committed error in failing to grant a severance because of the antagonistic positions of the several defendants. This is a

discretionary matter with a trial judge. Suarez v. State, 95 Fla. 42, 115 So. 519; Hawkins v. State, Fla. 1967, 199 So. 2d 277. We fail to find an abuse of discretion on this record, although it might be better policy [when two defendants are charged and it is apparent, prior to trial, that one will put on no evidence and the other will rely on the defense of entrapment] that they not be tried together.

It is also urged that the trial court denied the appellants a fair trial by permitting the Information to be read to the jury; that it permitted comment by the prosecutor as to the guilt of the appellants and permitted a prosecution witness to connect himself with the Chief Executive of this State. It was no error to permit the Information to be read to the jury. Phillips v. State, 28 Fla. 77, 9 So. 826; Accord-Lamb v. State, 90 Fla. 844, 107 So. 530; Hall v. State, 119 Fla. 38, 160 So. 511; Roberts v. State, Fla. App. 1966, 188 So. 2d 392. The comment by the prosecutor was not prejudicial, requiring a new trial. Tyson v. State, 87 Fla. 392, 100 So. 254; Grant v. State, Fla. 1965, 171 So. 2d 361; §§ 54.23, 924.33, Fla. Stat. Neither was the connection between the witness and the Chief Executive prejudicial.

The appellant, Sylvia, also contends that the trial court erred in denying him a fair trial because the judgment rendered differs from the verdict. This matter will be referred to at the conclusion of this opinion.

Error is also urged in that the evidence was insufficient to sustain the verdict. The evidence, as outlined above, constitutes sufficient competent evidence to sustain the verdict and, therefore, with such in the record it is the duty of an appellate court not to disturb the verdict under review. Sharon v. State, Fla. App. 1963, 156 So. 2d 677; Williams v. State, Fla. App. 1966, 187 So. 2d 913; Richburg v. State, Fla. App. 1967, 199 So. 2d 488.

It is also urged that the trial court erred in failing to permit the evidence to be reopened after both parties had

rested, upon motion by the defendants Beauchamp and Sylvia. This is another discretionary ruling by the trial judge [Ferrell v. State, 45 Fla. 26, 34 So. 220; Wilson v. Johnson, 51 Fla. 370, 41 So. 395; Pitts v. State, Fla. 1966, 185 So. 2d 164], and it is incumbent upon the appellant to demonstrate an abuse of this discretion before this court would be warranted in reversing the convictions on this point. State v. Sears, 148 Fla. 89, 3 So. 2d 721; Gilchrist v. State, Fla. App. 1965, 177 So. 2d 777; Hanson v. State, Fla. App. 1966, 187 So. 2d 54. It is apparent that the trial court exercised due diligence in determining what the additional evidence would disclose, and determined that it was something that could have been discovered prior to trial. Therefore, we find no error in his refusal to reopen the case. Harvey v. State, Fla. 1956, 87 So. 2d 582; Roberts v. State, Fla. App. 1967, 195 So. 2d 257.

The appellant, Beauchamp, also urges that the trial court erred during the course of the trial, when it refused to require the chief prosecution witness to produce written reports which he had made. These were in the nature of private communications and we do not find it error for the trial judge not to require their production when they were not being used by the witness to refresh his recollection. Whitaker v. Blackburn, Fla. 1954, 74 So. 2d 794; Bedami v. State, Fla. App. 1959, 112 So. 2d 284; Jackman v. State, Fla. App. 1962, 140 So. 2d 627; State v. McCall, Fla. App. 1966, 186 So. 2d 324; Goldman v. United States, 316 U.S. 129, 62 S.Ct. 993, 86 L. Ed. 1322; Lambert v. United States, 5th Cir. 1958, 261 F. 2d 799.

Therefore, examining the errors raised by the appellants, we find no reason to upset the guilty verdict returned against each. However, the judgment rendered as to the Appellant, Sylvia, differs from the verdict on the charge. The charge in the information was "* * * that Frank Hiram Beauchamp and Gary James Sylvia on the 12th day of March, 1967, in the County and State aforesaid, did un-

lawfully and feloniously break and enter a dwelling house located at 480 Northeast 180th Drive, City of North Miami Beach, Dade County, Florida, property of Harold and Elaine Schiff, with intent to commit a felony therein, to-wit: Robbery, * * *". The verdict was "Guilty", and the judgment reads "It appearing unto this Court that you, Gary James Sylvia, have been regularly tried and convicted of Unlawfully and feloniously breaking and entering a dwelling house located in Dade County, Florida, with the intent to commit a felony, to-wit: Grand Larceny * * *." It is apparent that the judgment as to Sylvia is erroneous.

The verdict as to the appellant, Gary James Sylvia, in case No. 67-430, be and the same is hereby affirmed, but the judgment of conviction and sentence be and the same are hereby reversed and set aside and the case as to the appellant, Sylvia, is returned to the trial court for the entry of an appropriate judgment on the verdict and sentence accordingly under the statutes of this State.

The verdict, judgment of conviction and sentence as to the appellant, Frank Hiram Beauchamp, in case No. 67-531, be and the same is hereby affirmed.

Affirmed in part; reversed in part with directions.

APPENDIX I

IN THE DISTRICT COURT OF APPEAL THIRD DISTRICT OF FLORIDA

Case Nos. 67-430 and 67-531

GARY JAMES SYLVIA, *Appellant,*

v.

THE STATE OF FLORIDA, *Appellee.*

FRANK HIRAM BEAUCHAMP, *Appellant,*

v.

THE STATE OF FLORIDA, *Appellee.*

Petition for Rehearing

COME NOW APPELLANTS, GARY JAMES SYLVIA and FRANK HIRAM BEAUCHAMP, by their undersigned attorneys and file this Petition for Re-hearing directed to the Opinion of May 7, 1968.

As grounds for such Petition Appellants say:

1. The Opinion of the District Court of Appeal, Third District states that the trial court exercised due diligence in determining what the additional evidence would disclose and that it was something that could have been discovered prior to trial.

The Court overlooked and failed to consider that no factual predicate exists for such conclusions. On the contrary, the Court overlooked and failed to consider the fact that the newly discovered evidence was proffered through the attorney for the victim. It obviously could not have been discovered prior to the time of its presentation to the Court

but was brought forward at the earliest possible moment. Even based upon the Opinion of May 7 itself, and the cases cited therein, the evidence should have been permitted to be presented in proper fashion to the jury.

2. The Court overlooked and failed to consider the fact that the denial of severance deprived Appellants of their constitutional right to a fair trial. Presentation of the defense of entrapment was forced upon Appellant, Gary Sylvia, over his objection in that he sought to have the case presented to the jury prior to any testimony for the defense. He was, therefore, pushed into a position where the trial of the case on the theory propounded by counsel of his choosing was not permitted. The theory of counsel for Appellant, Frank Beauchamp, was forced upon Sylvia by the presentation of evidence for "the defendants", notwithstanding his constitutional right not to present a defense.

3. The Court failed to consider the fact that the hypothesis of innocence was not disproved by the testimony and, therefore, the verdict of guilty should not have been allowed. Appellant, Gary Sylvia, did not know of the gun. The participant Deitch did not know of the gun. See *Williams* v. *State,* Fla. 206 So. 2d 446, and cases cited therein. That principle applies to the case at bar in a circumstantial evidence situation such as that presented where Gary Sylvia was in precisely the same position as the appellant in Williams, supra.

4. Totally antagonistic defenses were presented in the trial court. Realism in considering trial practice in criminal cases impels the conclusion that a fair trial was not afforded either Appellant where vital differences of approach on both legal and factual defenses were presented by respective counsel.

5. The Court overlooked and failed to consider the fact that the trial judge no longer has jurisdiction to enter an entirely different judgment for Sylvia.

Respectfully submitted,

MILTON E. GRUSMARK and
NATALIE BASKIN
Attorneys for Appellant Sylvia

By: MILTON E. GRUSMARK
Milton E. Grusmark

ENGEL AND POLLACK
Attorneys for Appellant
Beauchamp

By: MAX ENGEL
Max Engel

I HEREBY CERTIFY that a true copy of the foregoing Petition for Re-hearing was mailed to Arden Siegendorf, Esq., Assistant Attorney General, Attorney for Appellee, 1350 N. W. 12th Avenue, Miami, Florida, this 21st day of May, 1968.

MILTON E. GRUSMARK and
NATALIE BASKIN
Attorneys for Appellant Sylvia

By: MILTON E. GRUSMARK
Milton E. Grusmark

ENGEL AND POLLACK
Attorneys for Appellant
Beauchamp

By: MAX ENGEL
Max Engel

APPENDIX J

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

January Term, A.D. 1968

Wednesday, May 29, 1968

Case No. 67-430

GARY JAMES SYLVIA, *Appellant,*

v.

THE STATE OF FLORIDA, *Appellee.*

Case No. 67-531

FRANK HIRAM BEAUCHAMP, *Appellant,*

v.

THE STATE OF FLORIDA, *Appellee.*

Counsel for appellants having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

A True Copy

ATTEST:

WILLIAM L. CARTER
Clerk, District Court of Appeal,
Third District

cc: Milton E. Grusmark
Natalie Baskin
Engel & Pollack
Arden M. Siegendorf
J. F. McCracken

(The Mandates in the above styled cause have today been issued and mailed to the Clerk of the Criminal Court of Record of Dade County, Florida).

APPENDIX K

SUPREME COURT OF THE UNITED STATES

No. ————, October Term 1968

GARY JAMES SYLVIA, *Petitioner,*

v.

FLORIDA

Order Extending Time To File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Sept. 26th, 1968.

/S/ HUGO L. BLACK
Associate Justice of the Supreme Court of the United States

Dated this 4th day of Sept., 1968.